

By: Dev Gnanadev MD
Dev Gnanadev, M.D., Chair
Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Penalty
Relief by:

MICHAEL HENRY CECIL McBAY

Physician's and Surgeon's Certificate
No. G-63748,

Petitioner.

Case No. 800-2014-002380

OAH No. 2014050650

PROPOSED DECISION

This matter came on regularly for hearing before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, on June 26, 2014, at Los Angeles, California.

Petitioner, Michael Henry Cecil McBay (Petitioner), was present and was represented by David F. Rudich, Attorney at Law.

Pursuant to the provisions of Government Code Section 11522, the Attorney General of the State of California was represented by Christine R. Friar, Deputy Attorney General.

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

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FACTUAL FINDINGS

1. On August 15, 1988, the Medical Board of California (Board) issued Physician's and Surgeon's Certificate No. G 63748 to Petitioner. On September 1, 1992, an accusation was filed against Petitioner. By way of stipulation effective November 19, 1993, Petitioner's license was revoked. The revocation was stayed, and Petitioner was placed on probation for five years under various terms and conditions which included a 60-day suspension. On December 29, 1994, another accusation and petition to revoke probation was filed against Petitioner. On March 29, 1995, a Default Decision was issued revoking Petitioner's certificate effective April 28, 1995. Petitioner filed a Petition for Reinstatement on April 10, 2000. In a decision effective March 12, 2001, following an administrative hearing, Petitioner's certificate was reinstated and immediately revoked. The revocation was stayed, and Petitioner was placed on probation for a period of seven years under various terms and conditions. On June 9, 2004, Petitioner filed a petition for early termination and modification of probation. The petition was granted effective February 18, 2005. On October 1, 2008, another accusation was filed against Petitioner. On October 27, 2008, a full suspension-no practice order was issued. Petitioner surrendered his physician's and surgeon's certificate on November 4, 2008.

2. Petitioner's lengthy history of license discipline is related to a similarly lengthy history of cocaine abuse. As early as November 1993, Petitioner was ordered to participate in the Board's diversion program¹ as a condition of probation. He was ordered to return to the diversion program in 2001 when his license was reinstated.

3. When Petitioner sought reinstatement of his revoked certificate in 2000, the Administrative Law Judge hearing the case made the following findings:

2. On October 20, 1993, effective November 19, 1993, in a matter before the Board entitled In the Matter of the Accusation Against: Michael H. McBay, M.D., Case No. D-4916, petitioner's certificate was revoked, stayed, and placed on probation with terms and conditions for a period of five years. On March 29, 1995, effective April 28, 1995, in a matter before the Board entitled In the Matter of the Accusation and Petition to Revoke Probation Against: Michael H. McBay, M.D., Case No. D1-90-6057, petitioner's certificate was revoked.

3. The facts and circumstances underlying the discipline referenced in Finding 2 are that petitioner, for several years, had developed a substance abuse problem. Enrolling in Diversion, he failed to properly complete the Diversion Treatment Program and continued to use or be under the influence of illicit controlled substances. Placed on probation, he left the Diversion Program and was officially terminated and, again, used cocaine.

¹ The Board terminated that program in 2008.

4. Petitioner, following the loss of his license, soon “hit bottom.” A musician through college, medical school and residency, he also lost his career in music. Lacking the appropriate motivation, he lost his ambition for martial arts; and, finally, he lost his spiritual focus in God. Forced to re-evaluate his losses, the impact his substance abuse had on himself, his family, and his personal ambitions, he began the path toward rehabilitation.

5. Petitioner has been clean and sober since February 9, 1998.

6. Petitioner, readily acknowledging his past dissolute lifestyle, has committed himself to his sobriety. Acknowledging his addiction, he remains active in substance abuse therapy, including AA and supports the efforts of others, including physicians impaired by substance abuse, toward recovery. A submission by petitioner from David Murphy, M.D., Medical Director, Exodus Recovery Center, notes he has been seen weekly “for nearly 6 years regarding his chemical dependency.”

7. Petitioner, with the encouragement of his mother and Dr. Murphy, had participated in Continuing Medical Education and returned to the study of medicine. He has completed the Stanley Kaplan Clinical Review course.

8. Petitioner fully and articulately comprehends the import of his previous errant conduct. Sincerely remorseful, fully dedicated to his personal and professional recovery, he seeks licensure to return to the profession he now acknowledges and recognizes as his life’s work.

9. Petitioner, to his credit, is actively involved in community affairs, and Karate (he holds a black belt).

10. While involved in his dissolute conduct, petitioner acquired some vehicle code [*sic*] violations and an administrative fine related to unlicensed practice. All fines, terms and conditions of probation, and other legal impediments have been fully resolved.

(Exhibit 24, page 3.)

4. Based on those findings, the Administrative Law Judge recommended that Petitioner be permitted to practice in probationary status for seven years. The Board adopted the Administrative Law Judge’s Proposed Decision. At that time, he had been sober approximately three years.

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5. On November 16, 2004, Petitioner came before the undersigned Administrative Law Judge seeking early termination of probation. At that time, he had been sober approximately seven years. In his Proposed Decision, the undersigned made the following findings:

3. Petitioner has continued with his rehabilitative efforts since his license was reinstated and has achieved very credible results. He has practiced medicine with and under the supervision of one of his practice monitors and has maintained his sobriety, actively participating in Alcoholics Anonymous and the Board's Diversion Program. Petitioner has a perfect attendance and drug screening record with the Diversion Program. He is in full compliance with all of his probationary terms. He has accrued 99.5 CME credits, and regularly reads JAMA, JEP Emerging Issues and the American Journal of Geriatrics.

4. Petitioner continues to participate in the martial arts, attending two sessions each day. He also volunteers with the Heartfelt Foundation, an organization that is part of his church, through which he assists in feeding people and visiting hospitalized patients. In addition, through the Diversion Program, Petitioner counsels other physicians facing difficulties with substance abuse.

5. In February 2003, Petitioner became an ordained minister in his church, the Ministries of Movement of Spiritual Inner Awareness. He is collaborating on a book entitled *Spiritual High—Alternative to Drugs and Substance Abuse*. The book is based on his own experiences regarding his struggles with substance abuse.

6. The Board's Southern II Diversion Evaluation Committee and both of Petitioner's practice monitors support Petitioner's early release from probation. Both practice monitors' quarterly reports have been satisfactory, and neither monitor has seen any signs of Petitioner being intoxicated.

7. Petitioner has come to grips with the issues that initially caused his drug taking behavior, and he experienced a complete attitude change after losing his medical certificate, an occurrence that marked the nadir of his life. That attitude change has led Petitioner to return to his church with renewed vigor; it has led him to engage in a stable monogamous relationship; it has led him to return to medical practice; and it has led him to complete sobriety of almost seven years duration, and a genuine interest and willingness to assist others who are suffering a plight similar to the one through which he suffered. (Exhibit 25, page 4-5.)

6. At that time, the undersigned considered Petitioner's rehabilitation to be "exemplary." (*Id.* at page 5.)

7. In his Proposed Decision, the undersigned recommended that the petition be granted. The Board adopted the Proposed Decision effective February 18, 2005. However, despite his lengthy period of sobriety, Petitioner could not maintain it. His relapse resulted in the October 2008 certificate suspension and the surrender of his certificate approximately one month later.

8. Between 1991 and 2011, Petitioner suffered several criminal arrests and convictions related, directly or indirectly, to his substance abuse. Among the convictions were driving under the influence, possession of controlled substances, and prescription sales. At one point, he was placed in a Prop 36 diversion program, but he failed to complete it after he had a positive biological fluid test. In addition, he treated patients while under the influence of cocaine, a fact he readily admits.

9. In approximately 2009, Petitioner voluntarily enrolled in a three-month inpatient program and then entered the court-ordered Drug Court program at Clare Foundation in Santa Monica. In that program, he completed three months of inpatient treatment. He found the treatment at Clare Foundation “transformative and life-altering.” (Exhibit 1, page 4.) Following his inpatient treatment, he re-enrolled in an 18-month outpatient program at the Clare Foundation which he successfully completed. This resulted in the termination of his criminal probation through the Drug Court program. Shortly before his graduation from Drug Court, Petitioner enrolled in an outpatient drug program for physicians and other health care professionals run by marriage and family therapist, James Conway, who had been a group facilitator in the Board’s diversion program while Petitioner was a participant. Since his graduation from Drug Court, Petitioner has voluntarily returned to Clare Foundation as an outpatient and has remained in that program attending weekly group sessions and individual counseling. The program also requires him to undergo weekly random observed biological fluid testing. In approximately four years, Petitioner has never had a positive test.

10. Petitioner has returned to the regular practice of karate and he continues to work as a professional musician in addition to his regular job in the medical office of his former probation monitor, Reynaldo Makabali, M.D. where he converts written medical records to electronic files.

11. Petitioner attributes his cocaine addiction to an abusive father who beat him when he achieved less than perfect grades in school, and on his low self-esteem. He is almost 60 years old. His sobriety date is now April 2, 2010. However, Petitioner has come to the conclusion that his addiction is at its worst when he is not in a program and under strict controls. Therefore, he has sworn to remain in outpatient treatment permanently rather than permit his addiction to control his life again. He pledges to honor this commitment whether or not his medical license is reinstated.

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12. Although Petitioner wants his license to be reinstated, he does not desire unfettered licensure. He prefers to remain on probation for the duration of his career. Among the probationary terms and conditions he desires are a prohibition against prescribing controlled substances, a probation monitor, and biological fluid testing. He would also like to attend a remedial medical education program such as the Physician Assessment and Clinical Education Program (PACE) offered at the University of California - San Diego School of Medicine.

13. Petitioner has been unable to afford to maintain his participation in continuing education courses. He has attempted to remain current in new developments by reading articles on the Internet. He also regularly reads the Journal of Emergency Medicine and the Journal of Internal Medicine.

14. Petitioner offered letters from Venus N. Julian, M.D. and Reynaldo Makabali, M.D.² in support of his petition. (As indicated above, Dr. Makabali is Petitioner's current employer and former practice monitor.) Dr. Julian practices medicine in Dr. Makabali's office. Both physicians praised Petitioner for his intelligence, professional competence, strong work ethic, and his commitment to sobriety.

15. Petitioner offered the testimony of, and a letter by, long-time family friend Audry F. Manley, M.D., M.P.H. (ret). Dr. Manley is a former Deputy Assistant Secretary of Health, former Deputy Surgeon General, Acting Surgeon General, and Rear Admiral (ret) of the United States Public Health Service. She has taught medicine at the University of Chicago, the University of San Francisco, and at her alma mater, Spellman College, where she also served as the college's president, and continues to hold a professor emeritus position. Dr. Manley had limited contact with Petitioner until approximately five years ago when she retired to Las Vegas, Nevada. Based on her familiarity with Petitioner and his parents, Dr. Manley is confident Petitioner can return to the practice of medicine and practice safely.

16. Petitioner also offered a number of character reference letters in which the authors praised his strength of character and his commitment to sobriety.

17. Interspersed in his history of cocaine use and abuse dating from approximately 1988, Petitioner has experienced extensive periods of sobriety of seven, eight, and now four years. However, he has been unable to maintain his sobriety despite those periods of abstinence.

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² Dr. Makabali also testified at the hearing.

LEGAL CONCLUSIONS

1. Cause does not exist to grant the Petition pursuant to the provisions of Business and Professions Code section 2307 by reason of Findings 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, and 17.

2. Petitioner bore the burden of proving both his rehabilitation and his fitness to practice medicine. (*Houseman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084; *Feinstein v. State Bar* (1952) 39 Cal.2d 541.) This means the burden rests on Complainant to establish the charging allegations by proof that is clear, explicit and unequivocal--so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.) Petitioner's burden required a showing that he was no longer deserving of the adverse character judgment associated with the discipline imposed against his certificate. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395.)

3. Business and Professions Code section 2307, subdivision (e), states in relevant part:

The panel of the board or the administrative law judge hearing the petition may consider all activities of the petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner's activities during the time the certificate was in good standing, and the petitioner's rehabilitative efforts, general reputation for truth, and professional ability.

4. Petitioner's most recent disciplinary action, which resulted in the surrender of his certificate, occurred in 2008. He has been sober since April 2010. However, he continued to abuse cocaine between 2008 and 2010, and he suffered a number of criminal convictions until he entered the Drug Court program and again began to work toward rehabilitation. He has suffered disciplinary action in the past which led to periods of sobriety, but his sobriety has been transitory. His various periods of revocation and probation have all related to his continuing cocaine addiction and his inability to maintain sobriety. Those problems have been at their worst while Petitioner's license was in good standing and he was not under the supervision of a drug rehabilitation program. Since 2010, he has made strong strides toward re-gaining his sobriety. Petitioner's reputation for truth and professional ability is good.

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5. California Code of Regulations, title 16, section 1360.2 states:

When considering a petition for reinstatement of a license, certificate or permit holder pursuant to the provisions of Section 11522 of the Government Code, the division or panel shall evaluate evidence of rehabilitation submitted by the petitioner considering the following criteria:

(a) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

(b) Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480.

(c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subsections (a) or (b).

(d) In the case of a suspension or revocation based upon the conviction of a crime, the criteria set forth in Section 1360.1, subsections (b), (d) and (e).

(e) Evidence, if any, of rehabilitation submitted by the applicant.

6. Petitioner does not meet the majority of the Board's criteria for rehabilitation. His cocaine addiction has been extremely severe and long lasting. Although he has been sober for approximately four years, he has had other periods of sobriety lasting even longer. (Criterion (a).) Petitioner has committed several drug-related crimes, mostly between 2004 and 2010, a period covering times of probationary licensure and times of license revocation or surrender. He has also admitted practicing medicine, including direct patient care, while under the influence of cocaine. (Criterion (b).) The most recent of the crimes/acts occurred in 2011. (Criterion (c).) Although Petitioner has made strong strides toward rehabilitation since 2010, he has made similar efforts in the past with only temporary success. Those periods have well-exceeded his present period of sobriety. (Criterion (e).) Criterion (d) is inapplicable in this case in that the surrender and acceptance of Petitioner's certificate was not the result of a criminal conviction. (Exhibit 26.)

7. In addition, Petitioner has been unable to maintain his continuing medical education except through readings in two medical journals and on the Internet.

8. Petitioner has shown great strength of character in his continuing battle against his addiction. His commitment to permanent participation in a recovery program is laudable. However, that commitment does not ensure or even militate toward success. Petitioner has already failed to complete the Board's diversion program and a court-ordered diversion program, both of which placed him under stringent controls. Further, since the commitment to permanent participation in a program is completely voluntary, no assurance can be placed on its ultimate fulfillment.

9. Even if full confidence could be placed in Petitioner's commitment, he has not satisfied the majority of the Board's criteria for rehabilitation. In addition, although he has maintained his sobriety for the past four years, he has also maintained it for periods of seven and eight years in the past. He has convinced the Board no fewer than three times (twice through administrative law judges) that he was sufficiently rehabilitated to engage in the practice of medicine, only to relapse and suffer license discipline again. Petitioner has not sustained his burden of proof by clear and convincing evidence to a reasonable certainty that he is rehabilitated and fit to practice medicine. Additional time is needed to more fully establish his complete rehabilitation. The health, safety, welfare, and interest of the public cannot be adequately protected if Petitioner is permitted to regain licensure at this time. This finding is supported by Business and Professions Code section 2229, which states:

(a) Protection of the public shall be the highest priority for the Division of Medical Quality, the California Board of Podiatric Medicine, and administrative law judges of the Medical Quality Hearing Panel in exercising their disciplinary authority.

(b) In exercising his or her disciplinary authority an administrative law judge of the Medical Quality Hearing Panel, the division, or the California Board of Podiatric Medicine, shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence.

(c) It is the intent of the Legislature that the division, the California Board of Podiatric Medicine, and the enforcement program shall seek out those licensees who have demonstrated deficiencies in competency and then take those actions as are indicated, with priority given to those measures, including further education, restrictions from practice, or other means, that will remove those deficiencies. **Where rehabilitation and protection are inconsistent, protection shall be paramount.** (Emphasis added.)

10. During the administrative hearing, the Deputy Attorney General argued that, although Petitioner had submitted three letters signed by physicians under penalty of perjury, he did not satisfy the requirement that he provide two letters from practicing physicians possessing personal knowledge. Her argument was based on (1) the fact that Dr. Manley wrote her letter after she had retired and was no longer licensed in any state, and (2) the testimony of a Board investigator who interviewed Drs. Makabali and Julian who expressed somewhat limited knowledge of Petitioner's activities.

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11. Business and Professions Code section 2307, subdivision (c), states:

The petition shall state any facts as may be required by the board. The petition shall be accompanied by at least two verified recommendations from physicians and surgeons licensed in any state who have personal knowledge of the activities of the petitioner since the disciplinary penalty was imposed.

12. The letter from Dr. Manley does not satisfy the criteria set forth in Business and Professions Code section 2307, subdivision (c) in that she was not licensed in any state at the time she wrote the letter. The letters authored by Drs. Makabali and Julian do meet the criteria. The statute does not require complete and thorough knowledge of all of a petitioner's post-discipline activities. Limited knowledge is acceptable. The extent of the author's first-hand knowledge goes to the weight rather than the admissibility of the evidence.

ORDER

The petition of Michael Henry Cecil McBay for reinstatement of his surrendered physician's and surgeon's certificate is denied.

Dated: July 17, 2014

A handwritten signature in cursive script, reading "H. Stuart Waxman", written in dark ink.

H. STUART WAXMAN

Administrative Law Judge

Office of Administrative Hearings